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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1943

No. 344

C. F. MOODY,

Petitioner,

vs.

CLAUDE R. WICKARD, SECRETARY OF AGRICULTURE, AND HENRY MORGENTHAU, JR., SECRETARY OF THE TREASURY, AND UNITED STATES OF AMERICA (INTERVENOR).

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA AND BRIEF IN SUPPORT THEREOF.

G. LYLE JONES,
JOHN WATTAWA,
Counsel for Petitioner.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA.

To the Honorable, the Chief Justice and the Associate Justices:

C. F. Moody, Petitioner, prays for writ of certiorari to review a judgment of the United States Court of Appeals for the District of Columbia, entered June 30, 1943, in this cause, its number 8449 (R. 83) affirming a judgment of the District Court of the United States for the District of Columbia. The opinion of the Court of Appeals appears in the record herein (R. 79-82), and is not yet reported.

Questions Presented.

1. In a proceeding instituted in a United States District Court under the general condemnation statute (Act of

August 1, 1888, c. 728, 25 Stat. 357, 40 U. S. C., Sections 257, 258), does the Court have authority to enter a personal judgment against the United States for the value of the property involved, where prior thereto the United States had taken and appropriated said property, so found in that judgment which also decreed therein that title to said property was in the United States, no appeal from said judgment having been prosecuted, and the appropriation of said property by the United States having since continued?

2. Where, prior to the conclusion of its proceeding initiated under said general condemnation statute, the United States had appropriated the property to its use, is the United States thereby estopped from thereafter abandoning the property, with resulting authority then in a Federal Court to render in that proceeding a personal judgment against the United States for the full value of the property?

3. Is relief limited to prosecution under the Tucker Act, where more than 8 years ago the United States entered upon, and appropriated, property to its use, and continued, and still continues, such appropriation, refusing, however, to pay the award thereafter made therefor in its own condemnation proceeding, and not appealing from the judgment rendered therein over 4 years ago, which established such appropriation, and decreed title to said property to be in the United States, and granted recovery against the United States for the amount of said award?

4. If a Federal Court has the right to decree that property has been taken and appropriated, does it have the concomitant right to decree compensation for such property, without challenge by another Federal Court having no direct appellate jurisdiction in the premises?

Statutes Involved.

Sections 257 and 258 of the Act of August 1, 1888, c. 728, 25 Stat. 357, 40 U. S. C. as follows:

> "257. Condemnation of realty for sites and other uses; jurisdiction. In every case in which the Secretary of the Treasury or any other officer of the Government has been or shall be, authorized to procure real estate for the erection of a public building or for other public uses, he shall be authorized to acquire the same for the United States by condemnation, under judicial process, whenever in his opinion it is necessary or advantageous to the Government to do so. And the United States district courts of the district wherein such real estate is located, shall have jurisdiction of proceedings for such condemnation, and it shall be the duty of the Attorney General of the United States, upon every application of the Secretary of the Treasury, under this section and section 258 of this title, or such other officer, to cause proceedings to be commenced for condemnation, within thirty days from the receipt of the application at the Department of Justice.
>
> "258. Same; procedure. The practice, pleadings, forms and modes of proceedings in causes arising under the provisions of section 257 of this title shall conform, as near as may be, to the practice, pleadings, forms and proceedings existing at the time in like causes in the courts of record of the State within which such district court is held, any rule of the court to the contrary notwithstanding." (R. 70)

The following provisions of Paragraph 20 of the Act of March 3, 1887, c. 359, 24 Stat. 505, as amended, 28 U. S. C., Section 41 Judicial Code, Section 24, known as the Tucker Act, providing that District Courts shall have original jurisdiction—

> "Concurrent with the Court of Claims, of all claims not exceeding $10,000 founded upon the Constitution of the United States or any law of Congress, or upon

any regulation of an executive department, or upon any contract, express or implied, with the Government of the United States, or for damages, liquidated or unliquidated, in cases not sounding in tort, in respect to which claims the party would be entitled to redress against the United States, either in a court of law, equity, or admiralty, if the United States were suable, and of all set-offs, counter-claims, claims for damages, whether liquidated or unliquidated, or other demands whatsoever on the part of the Government of the United States against any claimant against the Government in said Court; * * * . No suit against the Government of the United States shall be allowed under this paragraph unless the same shall have been brought within six years after the right accrued for which the claim is made. * * * All suit brought and tried under the provisions of this paragraph shall be tried by the court without a jury". (R. 75, 76)

Jurisdiction.

This Court has jurisdiction under Section 240 (a) of the Judicial Code, as amended by the Acts of February 13, 1925, and of June 7, 1934.

By stipulation filed with the Clerk of this Court, the parties hereto have agreed that subject to the approval of this Court, the printed record, for the purpose of this petition for writ of certiorari, may consist of the appendices to briefs for petitioner and for respondents filed in the United States Court of Appeals for the District of Columbia, and of the proceedings in the Court of Appeals. The entire transcript of the record in the Court of Appeals has been filed with the Clerk of this Court.

Statement of the Case.

On December 7, 1934, Petitioner executed option giving the United States right to purchase within six months, at $4.00 per acre, certain lands owned by him in North Caro-

lina, and also the right, upon acceptance of that option, to use, occupy, and administer said lands, if the United States elected to do so, for the purpose of National forests (R. 37-39). The agreement also provided that if Petitioner's title was unsatisfactory to the Attorney General, the United States would, if it deemed advisable, institute condemnation proceedings (R. 38), which, of course, it had full right otherwise to do.

It appeared for the first time in the record herein, to wit, on August 30, 1938, that on January 21, 1935, the United States, by a letter from an acting regional forester, Department of Agriculture, had accepted that option (R. 22, 80).

On August 21, 1936—14½ months after the expiration of the option, and almost 2 years after its execution—the United States instituted in the United States District Court for the Western District of North Carolina a condemnation proceeding covering the lands in question, among others (R. 9-14). In the Petition in said proceeding, the only reference to said option was "that the apparent and presumptive owners of the above mentioned tracts of land executed and delivered option to convey said land to the United States at the prices stated therein" (R. 11, 12).

In his Answer thereto, Petitioner pleaded that said option had expired, and was of no force and effect (R. 14). The United States filed no pleading to said Answer, nor until August 30, 1938,—a year after a trial as to the value had been conducted and a jury had found the value of the land to be $6.00 per acre,—did it make reference in said condemnation proceedings to said letter of acceptance of January 21, 1935 (R. 22, 80).

In said proceedings, judgment of condemnation was entered February 11, 1937, in favor of the United States for said lands, among others (R. 52-57). Commissioners were appointed, who fixed the value of Petitioner's lands at $4.00 per acre (R. 16, 17). Petitioner excepted to that award, and

demanded jury trial, to which, under the provisions of the North Carolina statute, he was entitled (R. 17, 19, 80).

Jury trial took place thereafter upon the one controverted question, namely, the reasonable market value of Petitioner's lands, with resulting verdict on August 26, 1937, that said value was $6.00 per acre (R. 21, 45, 46). After said verdict, but before entry of judgment thereupon, the United States moved to be allowed to withdraw Petitioner's tracts from said condemnation proceedings (R. 21, 46, 59, 61), Petitioner opposing on the ground that the United States had in law already appropriated said property (R. 61, 62). At the hearing August 30, 1938, upon said motion (a jury not being demanded), evidence was presented establishing that the United States had appropriated Petitioner's property; that it had already entered upon Petitioner's tracts, and had cut, removed, and appropriated large quantities of timber, having first constructed roads on said tracts for that purpose (R. 22). Also, then, for the first time in said proceeding, as hereinabove stated, the United States referred to its said letter of option acceptance of January 21, 1935 (R. 80). The Court reserved its decision on said motion to abandon, pending the then forthcoming decision in *Wachovia Bank and Trust Company, Guardian,* v. *U. S. A.,* 98 F. (2d) 609 (R. 5, 22, 62, 80).

After that decision was rendered, and on December 3, 1938, the United States then moved for permission to withdraw its said motion to abandon Petitioner's tracts from the condemnation proceedings, and also moved for judgment for title to said tracts upon payment of $4.00 per acre (R. 62, 63, 80). On January 24, 1939, the Court found that Petitioner's said tracts had in law been appropriated by the United States, and that Petitioner was entitled to recover $6.00 per acre therefor, as fixed by said jury, and the Court granted permission to the United States to withdraw its pending motion to abandon said tracts, and adjudged that

the United States was the owner in fee simple of the same, and entitled to possession, and adjudged further that Petitioner recover of the United States the sum of $8,430.00 (1405 acres at $6.00 per acre), with interest thereon at six per cent from August 26, 1937, date of the jury's verdict fixing the value at $6.00 per acre (R. 20-24).

On April 24, 1939, the United States noticed appeal from said judgment (R. 6), but as such appeal was not prosecuted, it was dismissed on February 24, 1940 (R. 27).

Despite demand therefor, the United States did not pay said judgment nor any part thereof (R. 27, 28, 46). Accordingly, on May 2, 1941, Petitioner instituted the instant proceeding in the District Court of the United States for the District of Columbia, for mandatory injunction against Honorable Claude R. Wickard and Honorable Henry Morgenthau, Jr., respectively as Secretary of Agriculture and as Secretary of the Treasury, and also against Honorable Robert H. Jackson, as Attorney General, to require them, or each of them, to take appropriate ministerial steps to have said judgment for $8,430.00, with interest thereon at six per cent from August 26, 1937, paid in full (R. 2-9). Thereafter, on motion of said defendants, said District Court dismissed Petitioner's Complaint as to Honorable Robert H. Jackson, Attorney General, but declined to dismiss the proceedings as to the other defendants, who thereupon answered, the Secretary of Agriculture asserting counter-claim (R. 28-31).

October 14, 1942, the United States, upon its motion, was permitted to intervene (R. 66), and did then file Complaint in Intervention herein, asserting that by the entry of said judgment of January 24, 1939, it had been damaged by the difference between $6.00 and $4.00 per acre, and claiming from Petitioner $2,810.00, plus interest, and $500.00 additional, and costs (R. 63-66). Answer thereto was duly filed (R. 58-60).

Following trial, said District Court concluded that the judgment entered January 24, 1939, in the District Court of the United States for the Western District of North Carolina, was a valid, binding, and final judgment, and was *res adjudicata* as to any rights asserted by the United States in its Complaint in Intervention, and that the latter was estopped to assert said rights, and also that the Court was without authority to grant the injunctive relief requested by Petitioner, and accordingly it dismissed both the Complaint in Intervention and Petitioner's Complaint for Mandatory Injunction (R. 44-48).

Both the Petitioner and the United States then appealed to the United States Court of Appeals for the District of Columbia (R. 79), which, by its decision June 30, 1943, held that said District Court in North Carolina had no authority in the proceeding before it to enter a personal judgment against the United States, and that, therefore, the questions raised on the Complaint in Intervention required no consideration; and the judgment of the District of Columbia District Court was accordingly affirmed (R. 79-83).

Reasons Relied Upon for Allowance of the Writ.

The Court of Appeals erred, in that:

1. It did not give proper effect to applicable decisions of this Court.

2. It took into consideration terms of an option which was not in evidence and which constituted no part of the case.

3. It refused to give full effect to the final judgment of the Court in the condemnation proceedings wherein it was adjudicated that the Government had appropriated Petitioner's lands prior to said final judgment.

4. It improperly held that Petitioner was not entitled to judgment for the amount due by the Government for the property so appropriated by it.

5. It held that even though the property had been appropriated prior to final judgment in condemnation proceedings, the title did not pass until payment of price agreed upon, fixed in condemnation judgment.

6. It held that the Government could abandon the condemnation proceedings after it had actually appropriated the property in question.

Conclusion.

WHEREFORE, it is respectfully submitted that this Petition for allowance of a writ of certiorari should be granted.

G. LYLE JONES,
Legal Building,
Asheville, N. C.;
JOHN WATTAWA,
1317 F Street, N. W.,
Washington, D. C.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1943

No. 344

C. F. MOODY,

Petitioner,

vs.

CLAUDE R. WICKARD, SECRETARY OF AGRICULTURE, ET AL.

Respondents.

BRIEF IN SUPPORT OF PETITION FOR CERTIORARI.

The Opinion of the Court of Appeals appears in the record (79-82), and is not yet reported.

The questions presented, the statutes involved, statements of jurisdiction and of the case, and reasons relied upon, appear in the foregoing Petition, and in the interest of brevity are not repeated here.

Specification of Error.

It was error for the Court of Appeals to hold that the United States was free to abandon the condemnation proceeding at any time before payment of the award, and that it took no title until payment, and that the appropriation of the land by the United States did not make these rules

inapplicable, and that, therefore, the United States District Court in North Carolina had no authority to enter a personal judgment against the United States, the Court of Appeals thereby failing to distinguish between a condemnation proceeding in which there has been an appropriation, and a condemnation proceeding in which there has been none.

ARGUMENT.

I.

A personal judgment is proper in a proceeding under the General Condemnation Statute (Act of August 1, 1888), c. 728, 25 Stat. 357, 40 U. S. C., Sections 257, 258) where the land has been taken by consent or otherwise before compensation has been made.

In January, 1935, the United States appropriated petitioner's lands (R. 80). Such appropriation occurred about 18 months prior to the institution of the condemnation proceedings (R. 10-14), and has since continued without interruption (R. 80-82), and is continuing today. In its judgment entered January 24, 1939, the United States District Court in North Carolina found that petitioner "has been deprived of the title to, use of, and occupation of the lands which are the subject of this controversy and of the privilege of disposing of said property, and for that reason said property has, in contemplation of law, been taken and appropriated " (R. 23). No appeal was prosecuted from that judgment, or from any part thereof (R. 27, 46, 81), or contention raised against the right of the North Carolina Court to find that the land had been so appropriated.

The United States Court of Appeals for the District of Columbia, in finding that the Government took immediate possession in January, 1935, apparently assumed the posi-

tion that the same may have been effected under the privileges contained in the option executed December 7, 1934 (R. 82). However, the Government's proceeding in North Carolina was not brought under the option, but was brought as an independent condemnation action under the general condemnation statute, and so any rights given in the option could not have had application (R. 9, 13, 14, 22, 45, 46, 52, 53, 80). However, irrespective of the foregoing, the fact is that the United States has continuously appropriated the property for the past 8½ years, and still does, having initially appropriated it by cutting and removing large quantities of timber, acid wood, and other wood products, and by constructing roads on said land to remove said timber and products, and by incorporating said lands in its official maps as part of the National Forest Reserve (R. 15, 21, 22, 46).

In *Danforth* v. *United States*, 308 U. S. 271, 60 S. Ct. 231, 84 L. Ed. 240, this Court held that the time of taking in condemnation proceedings under the Flood Control Act of May 15, 1928, is the time of payment of the money award by the United States, unless a taking has occurred previously, in actuality or by a statutory provision fixing it otherwise; and that the Government could become liable for a taking, in whole or in part, even without direct appropriation, by such construction as would put upon the land a burden, actually experienced, of caring for floods greater than it bore prior to construction. It would appear that in such circumstances, which are essentially those of the case at bar, a personal, and not a conditional, judgment is appropriate, and is required in the condemnation proceeding.

In *Barnidge* v. *United States*, 101 F. 2d 295, C. C. A. 8th (1939), the court held that where the Government has taken possession and appropriated property prior to entry of

judgment in condemnation, then the judgment is an obligation of the general fund of the Treasury. The court added that "it has been held quite generally that where, as here, possession of the property is not taken at or prior to the institution of condemnation proceedings, the proceedings may be abandoned at any time before the actual acceptance of the property and payment therefor". Accordingly, it would appear therefrom that where, as in the case at bar, appropriation has actually been effected, at, or prior to, the institution of condemnation proceedings, the latter may not be abandoned before acceptance and payment, and that, therefore, a conditional judgment in said proceedings is inadequate and improper, and a personal money judgment is required and proper.

29 *Corpus Juris Secundum*, Paragraph 321, page 1360:

> "In general, whether a personal judgment may be rendered against the condemnor, depends on whether possession has been taken of the property. Since, as appears infra #375, it is the rule in many jurisdictions that the condemnor may, after judgment, but before possession is acquired, abandon the proceedings, it is ordinarily improper to render a personal judgment against the condemnor where the effect of the award and judgment is merely to fix the compensation, and no entry on the land has been made. But a personal judgment is proper where the land has been taken by consent or otherwise before compensation has been made."

It was held in *Matthews* v. *U. S.*, 113 F. 2nd 452 (C. C. A. 8th), 1940, that the Supreme Court of the United States has laid down the general rule that until taking, the condemnor may discontinue or abandon his effort, citing therein *Danforth* v. *United States*, 308 U. S. 271, 60 S. Ct. 231, 84 L. ed. 240; *Barnidge* v. *United States*, 8th Cir., 101 F. 2nd 295, 298; *Johnson & Wimsatt* v. *Reichelfelder*, 66 F. 2nd 217.

62 App. D. C. 237; *Owen* v. *United States,* 5th Cir., 8 F. 2nd 992; *Kanukanui* v. *United States,* 9th Cir., 244 F. 923.

Certiorari in above *Matthews* case was denied, 61 S. Ct. 142, 311 U. S. 703, 85 L. ed. 456. Accordingly, it would appear therefrom that if there has been a taking before the termination of the condemnation proceeding, the condemnor may not discontinue or abandon his effort, contrary to the holding herein of the Court of Appeals.

The court in *U. S. Fidelity and Guaranty Company* v. *City of Asheville, N. C.,* 85 F. 2nd 966, C. C. A. 4th (1936), stated:

> "The rule is well settled that the liability of the condemnor in condemnation proceedings cannot be avoided by abandonment of the proceedings after the landowner's right to compensation has become vested. *Garrison* v. *City of New York,* 21 Wall. 196 204, 22 L. ed. 612, 10 R. C. L. 237, 20 C. J. 1070. There is some conflict in the authorities as to whether the right to compensation becomes thus vested when the award is confirmed or only when the compensation awarded is paid or the land taken. See cases cited in Ann. Cas. 1913 E. 1062, and L. R. A. 1916 C. 644."

Where the Government takes possession and appropriates property prior to entry of judgment in condemnation, the judgment is an obligation of the general fund of the Treasury. *U. S.* v. *A Certain Tract or Parcel of Land in Chatham County, Ga.,* 44 F. Supp. 712.

In *Hessel* v. *A. Smith and Co.,* 15 F. Supp. 953. 956 (Illinois), which was a condemnation proceeding under Sections 258-a-e, Title 40 U. S. C. (Feb. 26, 1931, c. 307, Sections 1-5, 46 Stat. 1421, 1422), the court held:

> "It thus appears that the United States is irrevocably bound, having taken possession and title to said land under said statute and order of Court, to afford to the persons entitled thereto just compensation for the lands

so taken, including interest on any deferred payment thereof; such compensation to be ascertained and established by a judgment in the pending condemnation proceeding."

ARGUMENT.

II.

Where a taking occurred prior to the institution of condemnation proceedings August 21, 1936, such taking having continued during the pendency of said proceedings, and after their termination, and still continues, the judgment rendered in said proceedings on January 24, 1939, on adjudication of appropriation and on jury's verdict of value, no appeal therefrom having been prosecuted, is final, valid, and binding, without the further requirement upon the judgment creditor of re-litigating the same issues between the same parties in a proceeding to be instituted as under the Tucker Act.

In its Opinion, the Court of Appeals remands petitioner to the Tucker Act for relief (R. 82).

Such ruling overlooks that the United States took this land in January, 1935 (R. 80), and that such taking has since continued, and still continues; that an appropriation was formally adjudged by a Federal Court on January 24, 1939, which simultaneously decreed recovery of compensation based on a jury's verdict of value (R. 20-24), the judgment remaining unappealed (R. 46, 81); that for the past 8½ years petitioner has been deprived of all use of these lands, and since January 24, 1939, of title thereto, no payment of any kind having been made by the United States (R. 46), which in effect has kept petitioner's land and also his rightful compensation therefor; that after moving August 30, 1938, in its condemnation proceedings for permission to withdraw petitioner's land from its said proceedings (R.

59, 61, 80), the United States did move in said proceedings, on December 3, 1938, that it be permitted to withdraw its above motion to withdraw, and that the cause thence proceed to judgment (R. 46, 62, 80).

Accordingly, the judgment entered January 24, 1939, granting, *inter alia*, this last motion (R. 24), is in effect judgment procured by the United States, as it was rendered in a proceeding instituted by the United States, and in direct pursuance of its said motion of December 3, 1938.

As the record herein discloses, the Government's condemnation proceeding as such continued over the period August 21, 1936, to January 24, 1939 (R. 9-14), with resulting heavy expense upon petitioner in properly defending his interests therein. Although the United States prosecuted no appeal from said judgment of January 24, 1939, nor from any part thereof, it has declined to pay the recovery decreed therein (R. 46), simultaneously, however, and since, retaining the land. Since May, 1941 (R. 2-9), in an endeavor to secure payment of said recovery, petitioner has had the burden and expense of prosecuting proceedings for mandatory injunction in the United States District Court, and in the United States Court of Appeals for the District of Columbia. Two United States District Courts consider that the judgment entered January 24, 1939, is final, valid and binding, namely, the court which entered this judgment (R. 20-24), and also the United States District Court for the District of Columbia (R. 44-47). In the circumstances, an additional severe hardship would be visited upon this aged citizen in requiring him to carry the further heavy burden of instituting and prosecuting, probably at considerable length, proceedings under the Tucker Act which would have as their purpose the re-litigation between the same parties, of issues already determined in condemnation proceedings.

If the Government had intended to rely on any of the

provisions of the option and the letter of acceptance, it should have pleaded them upon the trial in the condemnation case. Not having done so, none of their provisions can now be considered.

It was said by Mr. Justice Roberts in *Baldwin* v. *Iowa State Traveling Men's Ass'n,* 238 U. S. 522, 75 L. ed. 1244, 51 S. Ct. 517:

> "Public Policy dictates that there be an end of litigation; that those who have contested an issue shall be bound by the result of the contest, and that matters once tried, shall be considered forever settled as between the parties. We see no reason why this doctrine should not apply in every case where one volutarily appears, presents his case and is fully heard, and why he should not, in the absence of fraud, be thereafter concluded by the judgment of the tribunal to which he has submitted his cause."

The United States is required in a condemnation proceeding to present every available ground in support of its asserted right. It can not prosecute that right piecemeal, so stated by Mr. Justice Vandevanter in *Grubb* v. *Public Utilities Commission,* 281 U. S. 470, 479, 74 L. ed. 972, 979, 50 S. Ct. 374:

> "As the ground just described was available, but not put forward, the appellant must abide the rule that a judgment upon the merits in one suit is res judicata in another where the parties and the subject matter are the same, not only as respects matters actually presented to sustain or defeat the right asserted, but also as respects any other available matter which might have been presented to that end."

In *United States* v. *Norwegian Barque Theckla,* 266 U. S. 328, 45 S. Ct. 112, 69 L. ed. 313, this Court said:

> "When the United States comes into a Court to assert a claim, it so far takes the position of a private suitor

as to agree by implication that justice may be done with regard to the subject matter. The absence of legal liability where but for its soverignty it would be liable, does not destroy the justice of the claims against it. * * * It is said that there is no statute by which the Government accepted this liability. It joined in the suit, and that carried with it the acceptance of whatever liability the Courts may decide to be reasonably incident to that act."

This Court distinguished the *Theckla* case from *United States* v. *Shaw*, 309 U. S. 465, 84 L. ed. 888, holding in the latter (P. 502, 503) that it comprised in effect two actions as against the one litigation (libel and cross-libel) comprising the *Theckla* case. The condemnation proceeding herein is similarly one litigation, rendering the *Theckla* decision particularly applicable.

In *United States* v. *Lynah*, 188 U. S. 445, 23 S. Ct. 349, 47 L. ed. 539, this Court said, at S. Ct. page 356:

"We are of the opinion that under these pleadings and issues raised thereby, the Circuit Court (of the United States) had jurisdiction to inquire whether the acts done by the officers of the United States under the direction of Congress, had resulted in such an overflow and injury of the plaintiff's land as to render it absolutely valueless, and if thereby the property was, in contemplation of law, taken and appropriated by the Government, to render judgment against it for the value of the property so taken and appropriated." (Parenthetical matter supplied.)

ARGUMENT.

III.

Excepting Danforth v. United States, 308 U. S. 271, and Barnidge v. United States, 101 F. (2d) 295, which actually support petitioner's contentions, all decisions relied upon in the Appellate Court decision, and indicated below, appear inapplicable in view of their distinguishing facts.

In *United States* v. *U. S. Fidelity and Guaranty Co.*, 309 U. S. 506, 84 L. ed. 894 (R. 81), it was held that immunity

of the United States and of Indian Nations in tutelage, from suit as defendants, could not be waived by official failure to object to the jurisdiction or to appeal from the judgment. But the condemnation proceeding in the cause at bar was instituted and prosecuted by the United States under the general condemnation statute, 40 U. S. C., Sections 257, 258; and final judgment was entered therein upon motion of the United States, condemnor.

In *Haskins Bros.* v. *Morgenthau*, 85 F. 2nd 677, 66 App. D. C. 178 (R. 81), it was held that a suit against the Secretary of the Treasury, Treasurer, and Comptroller General, in their official capacities, to compel return to processors of taxes which had been collected on imported cocoanut oil, was in effect a suit against the United States, to which the latter was a necessary party, and, therefore, could not be maintained where the United States had not consented to be sued. But the cause at bar concerns, not a proceeding as such still in prosecution, but a final and unappealed judgment entered in an action long since concluded and determined, in which the United States was not only a party but was the party plaintiff, and throughout its long pendency the moving party.

United States v. *Boston C. C. Co.*, 271 Fed. 877, C. C. A. 1st, next cited (R. 81), is inapplicable as no prior appropriation therein appears, as in the case at bar.

Danforth v. *United States*, 308 U. S. 271, next cited (R. 81), discussed hereinabove, supports petitioner's contentions, as it holds that the time of taking in condemnation is the time of the payment of the money award, *unless a taking has occurred previously, in actuality or by a statutory provision fixing it otherwise.* In the case at bar there was a prior taking, in actuality, which has since continued, and hence the exception applies.

In *Hanson Lumber Co.* v. *United States*, 261 U. S. 581, 43 S. Ct. 442, 67 L. ed. 809, next cited (R. 81), it was held that an act authorizing purchase of specific property, and limiting the price to be paid, did not preclude resort to condemnation under a general statutory authority to proceed in that way, title not to pass until compensation had been ascertained and paid, with no right to possession in the condemnor until reasonable, certain, and adequate provision had been made for obtaining compensation. In the case at bar, there has been no legislative act for purchase of specific property at a limited price; and title was decreed 4½ years ago as having passed, no compensation having then, or yet, been paid, appropriation having continued from January, 1935, and still continuing.

As heretofore observed, in *Barnidge* v. *United States*, 101 F. (2d) 295, next cited (R. 81), the court held that where possession of the property is not taken at or prior to the institution of condemnation proceedings, the latter may be abandoned at any time before the actual acceptance of the property and payment therefor. Conversely, it would appear that where possession is taken at or prior to such proceedings, the latter may not be abandoned before payment, and that personal money judgment can and should be entered therein. If a conditional judgment were entered under the circumstances of prior appropriation by the condemnor, who, however, declined to pay the award made in such proceedings, meanwhile retaining and continuing such appropriation, the proceeding might be held to remain pending indefinitely under legal impasse, because, having already appropriated, the condemnor could not abandon. Accordingly, the entry therein of a personal judgment would appear to be the solution.

United States v. *Bouchard*, 64 F. (2d) 482, C. C. A. 2nd, next cited (R. 81), holds that in condemnation proceedings instituted by the United States in Vermont, title does not

vest before payment of the judgment awarding damages, and that, therefore, the landowner's judgment against the Government is not absolute if the Government elects to abandon. A prior appropriation of the property does not appear to have occurred there, as here. Moreover, in the case at bar, the Government has never elected to abandon. On the contrary, it still holds on to the property after 8½ years of uninterrupted appropriation, exercising all acts of ownership except that of having paid the award.

In *Kanukanui* v. *United States*, 244 Fed. 923, next cited (R. 81), it was held that the institution and prosecution by the United States of a proceeding for the condemnation of property is not a "taking" of the property, and that the proceeding may be abandoned at any time. As no appropriation, or even encroachment, appears therein, this decision is inapplicable.

In *Hurley* v. *Kincaid*, 285 U. S. 95, 76 L. ed. 637, 52 S. Ct. 267 (R. 81), next cited, the land was embraced in a plan for development of protection against rising waters, authorized by the Mississippi River Flood Control Act, the landowner having conceded that such Act was valid and that it authorized the taking of his lands or an easement therein. However, he sought to enjoin carrying out of the proposed flood control work as it would affect his property, until condemnation proceedings therefor had been prosecuted; and such relief was denied.

The case at bar involves no injunction issuance to restrain a taking, the Government having already appropriated, not under any special Act providing for an emergency seizure of certain lands, but in anticipation of the exercise of its general powers of condemnation under the aforementioned Act of August 1, 1888; and it did thereafter exercise those general powers by a proceeding which continued over 2½ years.

Cherokee Nation v. *Southern Kansas Ry.*, 135 U. S. 641, 34 L. ed. 295, 10 S. Ct. 965, next cited (R. 81, 82), arose out of special Act of Congress of July 4, 1884, granting right of way to a railroad company through lands of the above Nation, pursuant to which condemnation proceedings were instituted, not by the United States but by the railroad company. The Act provided that before the railway should be constructed through any lands proposed to be taken, full compensation had to be made for all property proposed to be taken, and that if the landowners should appeal from the initial award, the company, by posting double the amount of the award, would be permitted to enter upon the land sought to be condemned, and proceed with the railroad construction.

This Court held that such provisions were adequate to secure just compensation, particularly as under said Act, title did not pass until compensation had been actually made; that the property, if entered upon during the appeal under the above requirements, was not taken until compensation had been ascertained, and then being paid, the title passed; that the property stood conditionally appropriated only, after double the initial award had been posted.

It does not appear that actual entry had been made upon said lands, but merely that entry had been proposed.

In the case at bar, the condemnor is the United States, not a private company, acting under the general condemnation statute, not under any special Act of Congress; and the condemnor made entry and appropriation, not as permitted on an appeal after double the amount of the initial award had been deposited, but before the institution of any condemnation proceedings, with no security to the landowner except its good name and credit, which was readily accepted. It is clear that as the prospective condemnor in the case cited was the railroad company, with its resources as sole security for the landowner, Congress was desirous

of establishing particularly ample safeguards for payment, and the question even arose, which this Court termed embarrassing, as to the landowner's relief if the ultimate compensation should exceed the double award deposit required to be made by the company on appeal by the landowner, before entering. Accordingly, this case is not controlling here.

In *Jacobs* v. *United States,* 290 U. S. 13, 54 S. Ct. 26, 78 L. ed. 142, next cited (R. 82), this Court determined what may be claimed as interest in a suit brought under the Tucker Act to recover compensation for property taken. However, none of the elements governing the case at bar appears therein, including prior condemnation proceedings, and an unappealed adjudication of appropriation and value, and for recovery, thereby rendering any later Tucker Act proceeding merely a re-litigating of the same issues between the same parties.

And for the same reasons *United States* v. *Meyer,* 113 F. (2d) 387, next cited (R. 82), also appears inapplicable.

Conclusion.

WHEREFORE, it is urged that this petition for a writ of certiorari should be granted.

Respectfully submitted,

G. LYLE JONES,
Legal Building,
Asheville, N. C.;
JOHN WATTAWA,
1317 F Street, N. W.,
Washington, D. C.
Attorneys for Petitioner.

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CITATIONS

In the Supreme Court of the United States

OCTOBER TERM, 1943

No. 344

C. F. MOODY, PETITIONER

v.

CLAUDE R. WICKARD, SECRETARY OF AGRICULTURE, AND HENRY MORGENTHAU, JR., SECRETARY OF THE TREASURY, AND UNITED STATES OF AMERICA, INTERVENOR

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

BRIEF FOR CLAUDE R. WICKARD AND HENRY MORGENTHAU, JR., AND THE UNITED STATES OF AMERICA IN OPPOSITION

OPINION BELOW

The opinion of the Court of Appeals (R. 79–82) is not yet reported.

JURISDICTION

The judgment sought to be reviewed was entered June 30, 1943 (R. 83). The petition for writ of certiorari was filed September 11, 1943. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

1. Whether the federal district court of North Carolina, in condemnation proceedings instituted by the United States, had jurisdiction to enter a money judgment against the Government for the value of the land condemned.

2. Whether mandatory relief will be granted against the Secretary of Agriculture and the Secretary of the Treasury to enforce a judgment against the United States entered in condemnation proceedings brought to acquire lands for national forest purposes when no specific appropriation to pay such judgment has been made and the National Forest Reservation Commission has not approved the price of acquisition as required by the Weeks Forestry Act.

3. Whether, when an owner contracts to sell land to the United States for $4 per acre with a provision authorizing condemnation proceedings in case the title is not satisfactory, the United States may recover the amount by which the judgment in proceedings brought to condemn the land exceeded $4 per acre, the title having been unsatisfactory and the landowner, in violation of the contract, having procured the entry of a judgment in excess of the contract price.

STATUTES INVOLVED

The material portions of the following statutes are printed in the record: Act of August 1, 1888,

c. 728, 25 Stat. 357, 40 U. S. C. secs. 257, 258 (R. 70); Weeks Forestry Act of March 1, 1911, c. 186, 36 Stat. 961, as amended, 16 U. S. C. secs. 513–521 (R. 70–75); the Tucker Act, Judicial Code, sec. 24 (20), 28 U. S. C. sec. 41 (20) (R. 75–76); and North Carolina Code (1939) sec. 1723 (R. 76–77).

STATEMENT

Petitioner, C. F. Moody, commenced this proceeding against the Secretary of Agriculture and the Secretary of the Treasury by complaint filed May 2, 1941, seeking to enforce a condemnation judgment of the United States District Court for the Western District of North Carolina. The complaint sought a mandatory injunction compelling the Government officers to take proper steps to have the judgment paid, including, if necessary, submission of the judgment to Congress. The officers answered and the United States intervened, alleging a claim for breach of a contract by which Moody agreed to convey the land condemned to the Government. There is no dispute as to the facts, which may be summarized as follows:

In December 1934, Moody executed an option to sell a tract of land in Macon County, North Carolina, to the United States for $4 per acre (R. 37–39). The option provided that Moody would convey complete title to the United States and if he was unable to establish a title satisfac-

tory to the Attorney General "then and in that event the United States will, if it deems advisable, institute proceedings for the condemnation of said lands." The option further provided that upon acceptance the United States might use and administer the lands for national forest purposes without charge. The National Forest Reservation Commission, which by the Weeks Forestry Act of March 1, 1911, c. 186, 36 Stat. 961, 16 U. S. C. sec. 516, is required to approve land acquisitions for national forests, approved the purchase of Moody's land at $4 per acre. By letter of January 21, 1935, Moody was notified of such approval and of the acceptance of his option (R. 40).

On August 21, 1936, condemnation proceedings were instituted in the North Carolina federal district court. The petition referred to the option and alleged that Moody's title had been found to be unsatisfactory to the Attorney General. (R. 9–3.) Moody's answer, while admitting execution of the option, alleged that it had expired prior to institution of the proceeding and also alleged a counter-claim arising from an asserted entry on the land by Government agents (R. 14–15). The court, on February 11, 1937, found that good title could not be acquired by deed and that the United States was entitled to condemn the land and ordered that upon appraisal and payment of the appraised value into court, title would vest in the United States (R. 44–48, 52–57).

Commissioners were appointed who appraised Moody's land at $4 per acre (R. 16–17). However, upon exceptions of Moody, a jury trial was had and on August 26, 1937, a verdict was returned fixing the value of Moody's land at $6 per acre (R. 21). On May 16, 1938, the United States moved to abandon the proceedings and on August 30, 1938, filed a certificate of abandonment which stated that the National Forest Reservation Commission had approved the purchase at $4 per acre, that payment could not be made, even in condemnation proceedings, of more than the purchase price approved by the Commission and that the obligation of funds available to purchase this land had been cancelled (R. 59–61). Moody opposed the motion to dismiss, asserting that the Government had already taken title and possession (R. 61–62).

On August 26, 1938, the Circuit Court of Appeals for the Fourth Circuit rendered its decision in *Wachovia Bank & Trust Co.* v. *United States,* 98 F. 2d 609, settling many questions as to the effect of contracts formed by acceptance of options to purchase land pursuant to the Weeks Forestry Act. Upon authority of that decision the United States, on December 3, 1938, moved to withdraw the motion to abandon and asked either that the exceptions to the commissioners' report be overruled and judgment entered at $4 per acre or that a hearing be held on the exceptions (R. 62–63). On January 24, 1939,

the North Carolina district court judgment here involved was entered (R. 20–24).[1] After reciting the previous proceedings, the court found that the single issue tried by the jury was the reasonable market value of the land, that there was no evidence in the record that the Government had accepted the option and that Government agents had from time to time gone upon the land and removed timber. The court expressed the opinion in the judgment that Moody had been deprived of title to and use of the property and that this constituted a taking. The operative portion of the judgment granted the Government's motion to withdraw its motion to abandon, decreed that the Government "is the owner in fee simple and entitled to the immediate possession" of the land and gave judgment against the United States for $6 per acre with interest from August 26, 1937. An appeal by the United States from this judgment was not prosecuted.[2]

The judgment not having been paid, Moody brought this proceeding on May 2, 1941, in the District Court for the District of Columbia seeking to compel the Government officers to procure such

[1] On June 3, 1939, the judgment was amended over objection of the Government so as to alter slightly the recital of paragraph 9 stating what had occurred at a hearing on August 30, 1938 (R. 25–26).

[2] Petitioner asserts that the United States has continued in the use and possession of the property (Pet. 2, 12, 13, 16, 20, 21, 22). This assertion is unsupported by the record and is contrary to the fact.

payment (R. 1–8). On November 3, 1941, a motion to dismiss was sustained as to the Attorney General, who had been joined as a defendant, but was overruled as to Secretary Wickard and Secretary Morgenthau (R. 29–30). On December 9, 1942, the district court entered judgment dismissing both the complaint and the complaint in intervention (R. 48). It concluded (1) that the condemnation judgment was valid and binding; (2) that the judgment was *res judicata* of the Government's claim; and (3) that the court was without authority to grant the relief requested against the Government officers (R. 46–47). Both Moody and the United States appealed from this judgment (R. 49, 79).

The Court of Appeals affirmed on the ground that the North Carolina district court did not have jurisdiction to enter a money judgment against the United States and that its judgment was therefore void (R. 79–82). Having reached this conclusion, the court determined that it was unnecessary to consider any of the questions raised by the complaint in intervention (R. 82).

ARGUMENT

1. Petitioner contends that a personal money judgment may be entered against the United States in condemnation proceedings. But he does not refer to a single instance where such a judgment has been sustained. On the contrary, in *United States* v. *Boston, C. C. & N. Y. Canal Co.,*

271 Fed. 877, 880–881 (C. C. A. 1), a district court decree purporting to reserve a right to enter such a judgment was reversed on appeal, the court holding that the statutes called for the usual conditional condemnation judgment, i. e., that upon payment title would vest in the condemnor. See *Mason City & Ft. Dodge R. Co.* v. *Boynton,* 158 Fed. 599 (C. C. A. 8).

Relying upon *United States* v. *The Thekla,* 266 U. S. 328, petitioner apparently contends that the judgment was authorized simply because the United States instituted condemnation proceedings (Pet. 16–19). Analogous contentions were rejected in *United States* v. *Shaw,* 309 U. S. 495, and *United States* v. *U. S. Fidelity Co.,* 309 U. S. 506, where this Court made it plain that the doctrine of *The Thekla* is limited solely to collision claims in admiralty, and that "without specific statutory consent, no suit may be brought against the United States," whether in the form of an original action or a set-off or a counterclaim. *United States* v. *Shaw,* 309 U. S. 495, 500; *Nassau Smelting Works* v. *United States,* 266 U. S. 101, 106. It is clear that the Act of August 1, 1888, c. 728, 25 Stat. 357, 40 U. S. C., secs. 257, 258, which gives to the federal district courts jurisdiction of condemnation proceedings brought by the United States and provides that the practice and procedure shall conform to state law, is not a consent to entry of a money judgment. *Carlisle* v. *Cooper,* 64 Fed. 472 (C. C. A. 2); *United States* v. *Shingle,*

91 F. 2d 85, 89 (C. C. A. 9); *United States* v. *John Ii Estate,* 91 F. 2d 93, 94 (C. C. A. 9); *Kanakanui* v. *United States,* 244 Fed. 923 (C. C. A. 9); *United States* v. *Knowles' Estate,* 58 F. 2d 718 (C. C. A. 9). In fact, the North Carolina condemnation procedure does not authorize a money judgment but merely a conditional condemnation judgment which expires in two years (R. 76–77).

Despite the absence of congressional consent, petitioner seeks to support the North Carolina judgment because of the statement of this Court in *Danforth* v. *United States,* 308 U. S. 271, and the repetition of the statement in other decisions (Pet. 13–15) that "until taking, the condemnor may discontinue or abandon his effort." Petitioner draws the negative inference that after taking physical possession the condemnor cannot abandon the proceedings and concludes therefrom that a money judgment may be awarded against the United States. These inferences are unwarranted, for this Court in the *Danforth* case recognized that "the determination of the award is an offer subject to acceptance by the condemnor." 308 U. S. 271 at p. 284. And notwithstanding the fact that "the government was in possession and control of the canal at the time the petition for condemnation was filed," the court in *United States* v. *Boston, C. C. & N. Y. Canal Co.,* 271 Fed. 877, 880 (C. C. A. 1), *supra,* held that a money judgment could not be entered against the

United States. See also *Cherokee Nation* v. *Kansas Railway Co.*, 135 U. S. 641.[3]

As the court below held (R. 81–82), petitioner has his remedy under the Tucker Act. Such suit would not, as petitioner asserts (Pet. 16–17), involve relitigation of the issues already decided. The property has been abandoned. Hence, recovery under the Tucker Act would not represent market value of the land but would be limited to the damage, if any, accruing because the United States had removed some of the timber therefrom and had occupied the property for a time as national forest lands pursuant to the contract which petitioner did not observe (R. 39).

2. Even assuming that the North Carolina judgment is valid, petitioner was not entitled to mandatory relief against the Government officers. The land was sought to be acquired under the Weeks Forestry Act, which requires that the price be approved by the National Forest Reservation Commission, 16 U. S. C. sec. 513 (R. 70–75). The Commission approved the contract price of $4 per acre (R. 40) but has never approved any larger amount. Funds for the purchase were made available by the Emergency Relief Appropriation Act of April 8, 1935, c. 48, 49 Stat. 115. By the Supplemental Appropriation Act of December 17,

[3] *Hessel* v. *A. Smith & Co.*, 15 F. Supp. 953 (E. D. Ill.) (Pet. 15) and *United States* v. *Lynah*, 188 U. S. 445 (Pet. 19) are irrelevant here for they arose under statutes in which the United States had consented to suit, i. e., the Declaration of Taking Act, and the Tucker Act, respectively.

1941, Sec. 501 (a), 591, 55 Stat. 810, 837, the Secretary of the Treasury was authorized to pay "such claims as are certified to him by the Comptroller General of the United States which were otherwise properly payable under the provision of the following Acts: Emergency Relief Appropriation Act of 1935 (49 Stat. 115) * * *." Petitioner's claim has never been certified by the Comptroller General, who is not a party to this action.

Obviously, petitioner cannot compel payment contrary to the Weeks Forestry Act.[4] Nor can he compel disbursement of the funds without certification by the Comptroller General. Cf. *Reeside* v. *Walker,* 11 How. 272; *Redfield* v. *Windom,* 137 U. S. 636; *Haskins Bros. & Co.* v. *Morgenthau,* 85 F. 2d 677 (App. D. C.), certiorari denied, 299 U. S. 588.

3. If the North Carolina judgment was valid, the district court erroneously dismissed the Government's complaint in intervention. The district court dismissed the Government's claim on the ground that the North Carolina judgment was *res judicata* of the rights asserted (R. 46). But the North Carolina court refused to reduce its judgment to the price stipulated in the contract solely because no issue as to the contract had been litigated in the condemnation proceedings (R. 22–23, 45–46). The claim for breach of contract pre-

[4] The fact that condemnation proceedings were instituted to clear title does not render the Weeks Act inapplicable. 16 U. S. C. sec. 517a (R. 73); *United States* v. *Graham & Irvine,* 250 Fed. 499 (W. D. Va.).

sents an entirely different cause of action from the proceeding to condemn. *Woodbury* v. *District of Columbia,* 92 F. 2d 202 (App. D. C.). Hence, the rule of *res judicata* preventing relitigation of questions already settled or of causes of action already determined has no application. *Cromwell* v. *County of Sac,* 94 U. S. 351.

It is equally clear that the contract is binding and enforceable. *Danforth* v. *United States,* 308 U. S. 271; *Wachovia Bank & Trust Co.* v. *United States,* 98 F. 2d 609 (C. C. A. 4). Petitioner is not, therefore, entitled to compel payment of any amount in excess of the $4 per acre stipulated in the contract. In order to assure preservation of this question in the event Moody's petition is granted, the Government has obtained an extension of time within which to file a petition for a writ of certiorari.

CONCLUSION

The decision of the court below is correct and no conflict of decisions is involved. Therefore, the petition for a writ of certiorari should be denied.

Respectfully,

CHARLES FAHY,
Solicitor General.

NORMAN M. LITTELL,
Assistant Attorney General.

VERNON L. WILKINSON,
ROGER P. MARQUIS,
Attorneys.

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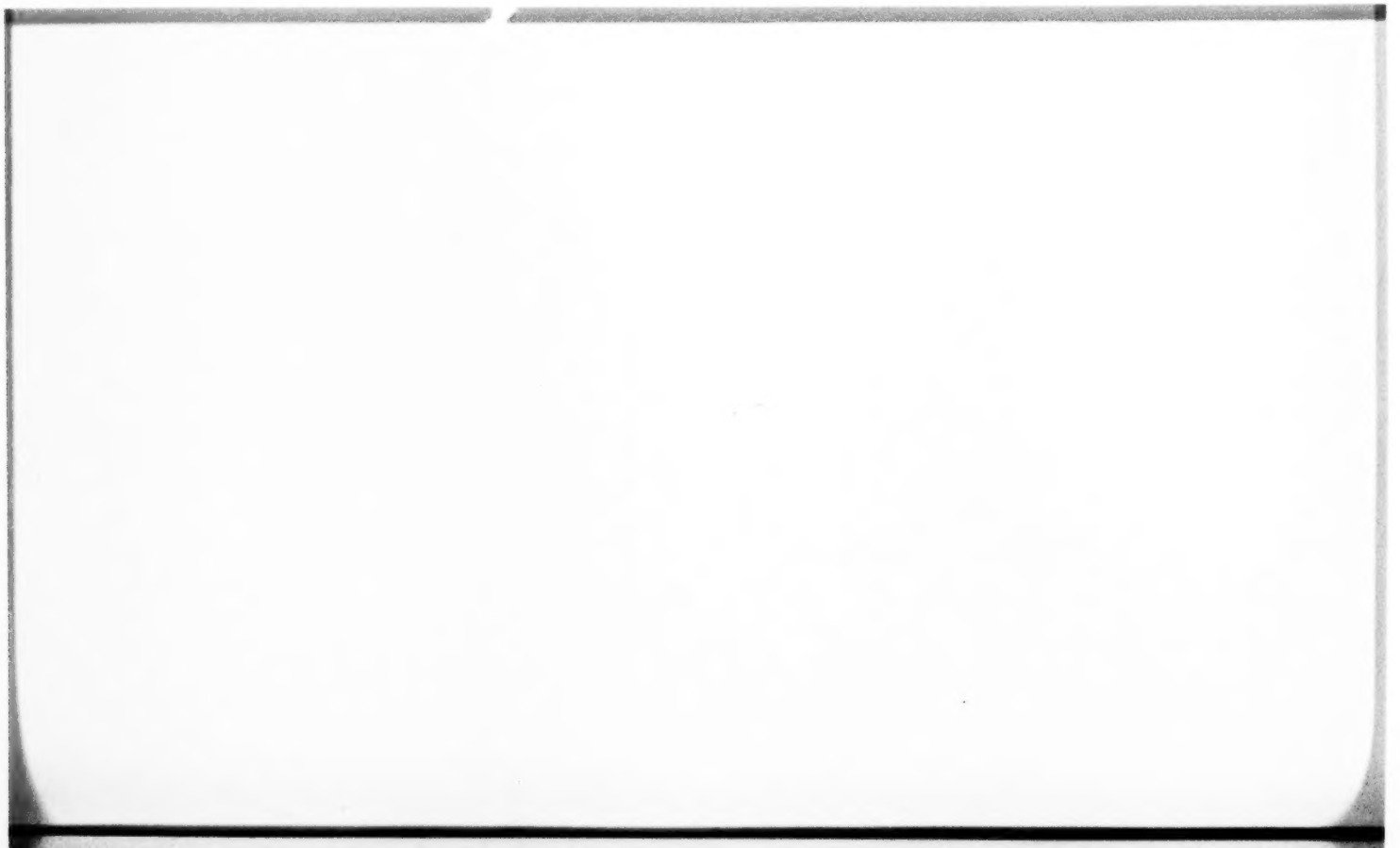

IN THE

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OCTOBER TERM, 1943.

No. 344.

C. F. MOODY, *Petitioner,*

v.

CLAUDE R. WICKARD, Secretary of Agriculture, and HENRY MORGENTHAU, JR., Secretary of the Treasury, and UNITED STATES OF AMERICA, Intervenor
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia.

REPLY BRIEF FOR PETITIONER.

G. LYLE JONES
JOHN WATTAWA
Attorneys for Petitioner

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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REPLY BRIEF FOR PETITIONER.

I.

The opinion of the Court of Appeals (R. 79-82) is now reported, 136 F. (2d) 801, Advance Sheets September 6, 1943.

II.

The Court of Appeals made no determination respecting Petitioner's right to mandatory relief, or the claims under the Complaint in Intervention. It held that the personal money judgment was invalid, and that, therefore, the questions raised on the Complaint in Intervention did not re-

quire consideration; and the judgment of the District Court was accordingly affirmed.

Petitioner submits that, in the circumstances, questions 2 and 3, purported to be additionally presented on page 2 of Respondent's brief, and argument thereupon, pages 10, 11, and 12, are not properly a part hereof.

III.

The United States appropriated Petitioner's lands nearly nine years ago. Now, and for the first time, the assertion is made on its behalf (Respondent's Brief, 10), that the property has been abandoned. No record reference supports that assertion, nor are any details vouchsafed as to when, and in what manner, the abandonment occurred. The condemnation proceeding still stands in the United States District Court in North Carolina, and possession of the property has never been tendered back to the Petitioner.

The condemnor moved August 30, 1938, in said condemnation proceeding, for permission to withdraw said tracts (R. 59, 61, 80), and again December 3, 1938, for permission to withdraw that Motion to withdraw and to have the cause thence proceed to judgment (R. 46, 62, 80). The latter Motion was granted by the judgment entered January 24, 1939, (R. 24), and no appeal was prosecuted therefrom, nor from any part thereof. This judgment also decreed that the United States "is the owner in fee simple" of said tracts, As long as that judgment remains valid, binding, and final, of record, such owner cannot legally abandon.

IV.

In *United States* v. *Boston C. C. & N. Y. Canal Co.*, 271 Fed. 877, cited Respondent's Brief 7, 8, the United States took over control of the Cape Cod Canal on July 25, 1918, as a war measure, pursuant to Presidential proclamation July 18, 1918, and remained in such control until March 1, 1920, when the same was turned back to the Canal Company.

On April 1, 1919, condemnation proceeding was brought under the River and Harbor Act of August 8, 1917. On August 31, 1920 (six months after control had been turned back), judgment was entered therein providing that upon payment of a certain sum, title should vest in the United States if it had not already vested, and providing further that in default of such payment within a reasonable time, the Company could then seek to have the control under the proclamation declared to have been a sequestration requiring compensation in the definite amount found in the condemnation proceeding. It was held upon appeal that in the circumstances, and under the verdict, the judgment should not have exceeded the conditional form provided for by the Act of 1917, under which that proceeding had been brought.

In summary, the United States was shown not to have appropriated title as in the case at bar, but to have had only a temporary control, effected solely as a war measure under Executive Order, such control having been relinquished six months prior to entry of judgment in the condemnation proceeding, and not thereafter existing. The United States never had appropriation, or even possession, at any time as incident to the condemnation proceeding.

Mason City and Fort Dodge R. Co. v. *Boynton,* 158 Fed. 599, cited Respondent's Brief 8, involved a condemnation proceeding predicated on an Iowa statute under which possession (not appropriation of title) had been taken pending an appeal after the amount of the Commissioners' award had first been deposited as required. As the facts are obviously distinguishable, the decision is inapplicable.

V.

None of Respondents' authorities challenge Petitioner's contentions that when the land has been actually appropriated, as adjudged in the case at bar, the condemnor cannot thereafter abandon the proceeding. 121 A. L. R. 72. Generally, the entry of judgment on the award in a con-

demnation proceeding also creates vested rights, thereby precluding abandonment. 121 A. L. R. 44.

This Court has held that there is a distinction between damage, and taking, and that it must be observed in applying the constitutional provision that private property shall not be taken without just compensation. *Bedford* v. *United States,* 24 S. Ct. 238, 240, 192 U. S. 217, 48 L. ed. 414, citing (240) *Gibson* v. *United States,* 166 U. S. 269, 41 L. ed. 996, 17 S. Ct. 578; *United States* v. *Lynah,* 188 U. S. 445, 47 L. ed. 539, 23 S. Ct. 349; *Pumpelly* v. *Green Bay and M. Canal Co.,* 13 Wall. 166, 20 L. ed. 557.

CONCLUSION.

Within recent years, and particularly since the beginning of hostilities, the United States has taken over an increasing number of large areas of land from its citizens, and will probably continue to do so for an indefinite period. Accordingly, in view of that situation, and of the other aspects shown herein, it appears clear that the United States Court of Appeals for the District of Columbia has decided a question of general importance which has not been, but should be, settled by this Court.

Respectfully submitted,

G. Lyle Jones
John Wattawa
Attorneys for Petitioner